CORRECTED COPY

No. 79-1640

In The

Supreme Court of the United States

October Term, 1980

JAMES F. SCHAD, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Appellants,

vs.

BOROUGH OF MOUNT EPHRAIM,

Appellee.

On Appeal from the Supreme Court of New Jersey

BRIEF FOR APPELLEE

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PROBABLE JURISDICTION NOTED OCTOBER 14, 1980

QUESTIONS FOR REVIEW

1. Must each municipality provide land for the commercial exploitation of every activity which is arguably First Amendment protected?

2. In balancing the police power of the State as expressed in a zoning ordinance against an incidental impact on commercial speech:

(A) Is the burden upon the State to establish the validity of its legislative scheme within a criminal prosecution? If so,

(B) Has that burden been obviated by the stipulation in this case? If not,

(C) Has that burden been met? If not,

(D) What is the proper action for this Court to take?

TABLE OF CONTENTS

Page

Questions For Review i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Jurisdiction 1

Ordinances and Constitutional Provisions Involved 2

Statement of the Case 2

A. Statement of the Facts 2

B. Procedural History 2

Summary of Argument 3

Argument:

I. Each municipality need not devote land to every commercial enterprise which is engaged in activity which is arguably constitutionally protected. 4

II. The State does not have the burden of proof within the confines of a criminal prosecution of establishing the validity of its statute. 9

Contents

Page

III. Counsel's stipulation relieved the appellee of any obligation of proving the validity of its ordinance. . 14

IV. The State has met any burden that may exist to show that the ordinance in question is not violative of the First Amendment. 17

V. If the State has not met the burden what action should this Court take. 23

Conclusion 24

TABLE OF CITATIONS

Cases Cited:

California v. LaRue, 409 U.S. 109 (1972) 20

Duran v. Salem Inn, 422 U.S. 922 (1975) 18

Euclid v. Ambler Realty, 272 U.S. 365 (1926) 6

Hyland v. Morris Township, 130 N.J. Super. 471 (App. Div. 1974), aff'd, 66 N.J. 31 (1974) 11

Metromedia v. City of San Diego, 164 Cal. Rptr. 510 (1980) 6, 11, 21

Starshock, Inc. v. Shusted, 370 F. Supp. 506 (D. N.J. 1974), reversed on other grounds, 493 F. 2d 1401 (3rd Cir. 1976) 18, 19

Contents

Page

State v. Barnes, 84 N.J. 362 (1980) 23

United States v. O'Brien, 391 U.S. 367 (1968) 17, 18, 19, 24

Valley View Village v. Proffet, 221 F. 2d 412 (6th Cir. 1955) 6

Vickers v. Gloucester Township Committee, 37 N.J. 232 (1962) 5

Young v. American Mini Theatres, 427 U.S. 15 (1976) 8, 18, 20, 21, 24

Statutes Cited:

N.J.S. 2A:16-50 14

N.J.S. 2A:16-53 14

N.J.S. 40:55-30 9

N.J.S. 40:55-39 13

N.J.S. 40:55D-62 9

United States Constitution Cited:

First Amendment ..... i, 3, 4, 5, 9, 12, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24

Contents

Page

Rules Cited:

New Jersey Court Rules:

Rule 2:12-9 3

Rule 4:52-1 14

Other Authorities Cited:

McQuillen, Mun. Corp., §25.296 11

New Jersey Constitution, Article IV, Section 7, paragraph 11 10

The American College Dictionary, Random House, 1957 ... 12

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BRIEF FOR APPELLEE

OPINIONS BELOW

The appellee adopts the recitation of the opinions below as set forth on pages 1 and 2 of the appellants' brief.

JURISDICTION

The appellee submits that this Court is without jurisdiction over this matter as set forth in the jurisdictional statement of the

appellee's motion to dismiss the appellants' appeal at pages 3 and 4 of that motion, and as argued in Points I through IV of that motion found at pages 7 through 12, inclusive.

ORDINANCES AND CONSTITUTIONAL PROVISIONS INVOLVED

Assuming there are constitutional issues before this Court, the appellee adopts the ordinances and constitutional provisions cited by the appellant at pages 2, 3 and 4 of the brief for the appellants.

STATEMENT OF THE CASE

A. Statement of the Facts

The appellee adopts the Statement of Facts as set forth in the appellants' brief.

B. Procedural History

This action began with complaints by the Borough of Mount Ephraim charging James F. Schad, 613 Corporation and Juliette Ann DiLuciano with the use of the premises of 613 Corporation for a use contrary to the provisions of the Borough of Mount Ephraim Zoning Ordinance Section 99-15B. At that time, counsel for the respective parties entered into a stipulation of seven legal issues and six factual statements which are set forth both in the opinion of the Camden County Court at page 1a of the appendix of the appellants' appeal. The Municipal Court of the Borough of Mount Ephraim found the appellants guilty of the various charges, including violation of the Borough's zoning ordinance.

With respect to the six stipulated facts, the parties failed to agree on number 4 and testimony was taken in the Municipal

Court from the Chief of Police and Building Inspector of the Borough of Mount Ephraim on the issue of the Borough's alleged selective enforcement of the zoning ordinance, along with testimony on the issue of whether other forms of live entertainment in the Borough were either nonconforming or accessory uses. No other testimony was produced by either party.

The appellants filed a notice of appeal which was heard by the Camden County Court. That court held that there was no selective enforcement of the Borough's zoning ordinance, nor did it offend the First Amendment.

The Superior Court of New Jersey, Appellate Division, reviewed the opinion and record before the Camden County Court and affirmed the opinion of the Camden County Court essentially for the reasons contained in that opinion.

The New Jersey Supreme Court declined to grant the petitioners-appellants' petition for certification which by virtue of New Jersey Court Rule 2:12-9, also effected an automatic dismissal of the appeal.

The appellants then filed an appeal from the Supreme Court of New Jersey and a petition for writ of certiorari to the Supreme Court of the United States. This Court noted probable jurisdiction on October 14, 1980.

SUMMARY OF ARGUMENT

The matter before the Court concerns a municipality's power to promulgate and enforce its zoning ordinance; this is *not* a First Amendment case.

Clearly a municipality has the right to promulgate rules and regulations which serve to regulate and control uses within its

boundaries. In some situations, as in the present, these regulations may not provide land for all uses. No one would question the right of a zoning body to ban a slaughter house or any other use which produces a noxious odor in a residential zone. This is because zoning ordinances concern themselves with making sure that the pig is in the barnyard and not in the parlor.

Any use of property is, in a sense, a form of expression, whether it is the slaughter house or the printing presses of the local newspaper. But clearly, every use of property is not a form of speech entitled to the protection of the First Amendment. Neither the failure to include land within its commercial zone for the commercial exploitation of live entertainment in general and live nude dancing specifically is violative of the First Amendment.

The burden, if any, has either been obviated or met by the appellee. Assuming, however, that there was an omission in the State's proofs, a remand or reversal would be the appropriate remedy as opposed to a finding of unconstitutionality.

ARGUMENT

I.

Each municipality need not devote land to every commercial enterprise which is engaged in activity which is arguably constitutionally protected.

Each municipality need not devote land to every commercial enterprise which is engaged in activity which is arguably constitutionally protected. This is true on both authority and reason.

Numerous decisions in New Jersey and elsewhere sustain the legislative will to not be required to provide land for every

use. *Vickers v. Gloucester Township Committee,* 37 N.J. 232 (1962).

This is nothing more than a recognition that the utilization of land within a community determines its character. The whim of the landowner is therefore made subservient to the rights of the residents to have some voice in the shaping of that character through their local elected representatives in the creation of a comprehensive zoning ordinance. Were the will of the community at large to be excluded from this basic decision-making process, even with respect to free speech challenges only, would result in the excesses which brought land use legislation into being.

This is so because, as in this case, the ingenuity of man is such, that every zoning regulation may be described in First Amendment language.

No one would argue that newspapers are not included within the penumbra of the First Amendment. Nor would anyone argue that newspapers cannot exist without the large "factories", the successors of the small print shops, which "manufacture" our great daily papers. The appellants' argument as applied to the above hypothetical situation would override the legislative decision that such a land use would be inappropriate with respect to any parcel of land intended for this use by the owner.[1] To carry the argument further, the pig farmer would argue that to "proclaim" his affection for those much maligned creatures, he has established a home for them on a piece of ground newly acquired in a residential zone; and his partner, in this commercially viable enterprise, would "announce" his opinion concerning those same beasts by establishing a slaughter

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1. Presumably, even if the land were zoned residential, the fact that the zone is labeled commercial is of no moment so long as the ordinance is construed to not permit the desired, arguably free speech, use.

house next door. What of the homeowner who faces his house differently from all other houses to "express" his attitude toward the beneficience of the sun, or the person who wants to build a starkly modern home in a colonial community to "voice" that a sharp division with the past is in the national interest. Residential developers would argue that building at a density of twenty units to the acre, as opposed to five, "states" their position with respect to togetherness. Chaos would reign.[2]

Just because opera and libraries are constitutionally protected does not mean that there are not locations inappropriate for opera houses and libraries. The political subdivisions of this nation are not, nor should they be, uniform. Some contain only one zone and it is residential. *See, for example, Valley View Village v. Proffet,* 221 F. 2d 412 (6th Cir. 1955) wherein commercial uses were permissibly excluded. *Also see, Euclid v. Ambler Realty,* 272 U.S. 365 (1926), wherein industrial uses were excluded. People should be free to choose to live in a community which expresses their conception of the "good life", and people within communities should have the power to exercise some control over their destinies.

This power does not cease to exist at the point that a regulation can be described as a prohibition.[3] As stated in *Metromedia v. City of San Diego,* 164 Cal. Rptr. 510 (1980), at p. 518:

> "The distinction between prohibition and regulation in this case is one of words and not

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2. Municipal governments already overwhelmed by the task of creating a comprehensive zoning ordinance would be immobilized if they had to provide for all arguably constitutionally-protected activity and the failure to do so should not invalidate their efforts.

3. Appellee would describe the ordinance as a regulation of commercial entertainment, one which permits all forms other than live.

substance. 'Every regulation necessarily speaks as a prohibition.' (*Goldblatt v. Hempstead* (1962) 369 U.S. 590, 592, 82 S. Ct. 987, 989, 8 L.Ed.2d 130.) In the present case, for example, plaintiffs describe the ordinance as a prohibition of off-site advertising, while the city describes it as a regulation of advertising, one which limits advertising to on-site signs. Surely the validity of the ordinance does not depend on the court's choice between such verbal formulas.

Rather than strive to develop a logical distinction between 'regulation' and 'prohibition' and to find themselves embroiled in language rather than fact, courts of other jurisdictions in recent decisions have held that a community can entirely prohibit off-site advertising. (*John Donnelly & Sons v. Mallar,* supra, 453 F. Supp. 1271; *Murphy, Inc. v. Westport* (1944) 131 Conn. 292, 40 A.2d 177; *John Donnelly & Sons, Inc. v. Outdoor Advertising Bd.,* supra, 369 Mass. 206, 339 N.E.2d 709; *Suffolk Outdoor Adv. Co., Inc. v. Hulse,* supra, 43 N.Y. 2d 483, 402 N.Y.S. 2d 368, 373 N.E.2d 263; *Matter of Cromwell v. Ferrier,* supra, 19 N.Y. 2d 263, 279 N.Y.S. 2d 22, 225 N.E.2d 749.) These decisions fall within the general principle that a community may exclude any or all commercial uses if such exclusion reasonably relates to the public health, safety, morals or general welfare. (*Town of Los Altos Hills v. Adobe Creek Properties, Inc.,* (1973) 32 Cal. App. 3rd 488, 502-504, 108 Cal. Rptr. 271, and cases there cited; see *Associated Home Builders etc., Inc. v. City of Livermore,* supra, 18 Cal. 3d 582, 606, fn. 23, 135 Cal. Rptr. 41, 557 P.2d 473.) As the Oregon Supreme Court

> explained in *Oregon City v. Hartke,* supra, 240 Or. 35, 400 P.2d 255, 'It is within the police power of the city wholly to exclude a particular use if there is a rational basis for the exclusion. . . .' It is not irrational for those who must live in a community from day to day to plan their physical surroundings in such a way that unsightliness is minimized. The prevention of unsightliness [or the promotion of other legitimate state interests] by wholly precluding a particular use within the city may inhibit the economic growth of the city or frustrate the desire of someone who wishes to make the proscribed use, but the inhabitants of the city have the right to forego the economic gain and the person whose business plans are frustrated is not entitled to have his interest weighed more heavily than the predominant interest of others in the community."

In *Young v. American Mini Theatres,* 427 U.S. 15 (1976), this Court sustained a time, place and manner regulation of commercial speech for the City of Detroit. That same ordinance if adopted by many municipalities would prohibit entirely all such regulated activity. Indeed, there are many municipalities where there is no land not within 500 feet of a residence. Implicit in the *Young* decision is that Detroit could prohibit these uses in the residential areas of the city. Those residential areas are indistinguishable from many municipalities located in a large market area.[4]

It would seem to be the inescapable conclusion that whether a municipality must devote some land to a particular use must of

4. The Borough of Mount Ephraim, New Jersey, is one of a number of municipalities comprising the County of Camden, which is located directly across a river from the City of Philadelphia, Pennsylvania.

necessity depend upon a factual analysis of the pecularities of the land itself, the municipality in which the land is situate, and the market area surrounding the municipality.

Since all regulations of land use may be posited so as to present First Amendment issues, it would not be wise to adopt a mechanistic approach to the resolution of the inadvertent collision of the zoning power and its incidental impact on commercial speech. To elevate either at the expense of the other must surely lead to bizzare and unwanted results. Each case must be analyzed in the factual context in which it is presented and a determination of facial invalidity of the ordinance in question is not warranted.

II.

The State does not have the burden of proof within the confines of a criminal prosecution of establishing the validity of its statute.

The police power of the State emanates from the sovereignty of the State. As direct descendants of the King, the State has the right and obligation to legislate for the promotion of the public health, safety, morals and general welfare. The power to zone is delegated to the local political subdivision of the State under a mandate to promote the welfare of the local citizenry. Pursuant to the New Jersey Constitution and the legislative delegation contained at N.J.S. 40:55-30, *et seq.*[5], the

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5. This statute has since the original complaint been repealed by L. 1975, C. 290, and replaced by N.J.S. 40:55D-62, which is substantially similar to the source statute. The full text of N.J.S. 40:55-30 is as follows:

> "Any municipality may by ordinance, limit and restrict the specified districts and may regulate therein, buildings and

(Cont'd)

Borough of Mount Ephraim adopted Chapter 99 of its municipal ordinances, which deals with zoning.

When such a comprehensive legislative scheme is created, it carries with it a strong presumption of validity. New Jersey Constitution, Article IV, Section 7, paragraph 11.[6] To protect this presumption, a party challenging such legislation bears the burden of proving that either the legislation is not related to a legitimate police power objective or that the legislation is

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(Cont'd)

> structures according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority, subject to the provisions of this article, shall be deemed to be within the police power of the State. Such ordinance shall be adopted by the governing body of such municipality as hereinafter provided, except in cities having a board of Public Works, and in such cities shall be adopted by said Board.
>
> The authority conferred by this article shall include the right to regulate and restrict height, number of stories, and sizes of buildings, and other structures, the percentage of lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use and extent of use of buildings and structures and land for trade, industry, residence, or other purposes."

6. The New Jersey Constitution, Article IV, Section 7, paragraph 11, provides:

> "The provisions of this Constitution and any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms, but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law."

unreasonable, arbitrary or capricious. *Hyland v. Morris Township,* 130 N.J. Super. 471 (App. Div. 1974), *aff'd,* 66 N.J. 31 (1974); *Metromedia, Inc. v. City of San Diego,* 164 Cal Rptr. 510, *cert. granted,* ___ U.S. ___(1980); *McQuillen,* Mun. Corp., §25.296.

The regulation of land use is so related to the public's health, safety, morals and general welfare that municipalities are empowered to enact zoning ordinances.

One provision of the zoning ordinance in question enumerates a number of retail and service businesses for which land in its commercial zone may be put to use (Mount Ephraim Zoning Ordinance 99-15B). Another provision prohibits all uses not so permitted therein (Mount Ephraim Zoning Ordinance §99-4). Absent in this recitation of permitted uses are any commercial establishments customarily devoted to offering to the public live entertainment, such as theatre, sports arenas, opera houses, etc. It is clear, therefore, and the trial court held, that land in this zone may not be so utilized.[7] (Opinion of Camden County Court, p. 6a of appellants' appeal).

Even a cursory reading of the permitted uses reveals that they are designed to permit those businesses which are necessary to serve the immediate needs of this small primary residential community. Certainly, it cannot be seriously contended that this is an irrational scheme.[8]

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7. The Borough's zoning ordinance creates two other zones, both of which are residential.

8. This is true even without reference to the problems which would be caused by the omitted uses, such as large crowds, parking, extra police protection, extra medical facilities required, removal of trash, and other problems inherent in the omitted uses. Appellant's argument would impose upon the Borough not only its use, but the other omitted uses such as the opera hall, sports arena, and theatre as well.

Accordingly, the ordinance in question is entitled to the presumption of validity and its procedural safeguard, which places the burden of proving its invalidity upon the appellants herein. This is the general rule.

The Bill of Rights was adopted to secure to the citizenry those great rights which are indispensable to freedom. Prime among them are the rights found in the First Amendment and specifically, the right of free speech. Appellants would suggest that so important is the right of free speech that in its protection, an exception is made to the general rule that a party attacking the legislative scheme bears the burden. However, this is not so. Also, the mere incantation of the First Amendment does not make this a First Amendment case. This is a zoning case!

In a criminal prosecution, the State is not required to prove the constitutional validity of the statute. This should be true even if the validity is raised by the defendant upon motion and brief. The presumption of validity surrounding the exercise of the police power, through a statute, is sufficient to impose upon the defendant the burden of proof, as previously stated. This would be especially true of legislation designed to regulate areas within the police power which may have an incidental impact on the commercial exploitation of speech.[9]

The thrust of the ordinance in question being related to land use and not speech, should in the absence of facts produced by the defendant showing it to be a sham of misdirection, be sufficient to establish the necessary nexus and rationality of the legislative scheme in a criminal prosecution. Were this not so,

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9. Appellee uses the word "exploitation" throughout with absolutely no derogatory connotation. Appellee uses that word in its definition as follows: "To turn to practical account; utilize for profit" (in the way that the Metropolitan Opera Company exploits opera or the Bolshoi Ballet Company exploits ballet). The American College Dictionary, Random House, 1957.

the State would have an impossible burden to convict a defendant of any offense from murder to bank robbery to speeding.

It is no more to be expected of a municipality to prove the validity of its legislation in a prosecution under its zoning ordinance than for the State to have to prove the validity of its statutes with respect to murder, bank robbery or speeding, even as to a defendant who, by motion supported by brief, argues he wanted to express an opinion of John Lennon's music, a 21-½% prime interest rate, or the 55 miles per hour speed limit.

Additionally, assuming the validity of the scheme were sustained in one prosecution that would hardly discourage the next defendant from raising the same issue. On how many occasions must the validity of the legislative scheme be affirmatively proven and with respect to how many challenges in addition to speech. What of freedom of the press, religion, assembly and redress of grievances, and we have only exhausted the First Amendment. Criminal trials already unwieldy would receive their death blow. The power of government to bring a transgressor to justice would succumb to the onslaught of the well-financed, ingenious defense attorney.

This is especially true when viewed in relation to the numerous other remedies that were available to the appellants. He could have:

1. Sought a variance, N.J.S. 40:55-39[10];

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10. The complete text of N.J.S. 40:55-39 is set forth in appellants' brief at footnote 28.

2. Sought review by way of declaratory judgment, N.J.S. 2A:16-50, *et seq.*[11]; or

3. Brought a chancery action to enjoin the enforcement of the ordinance.[12]

All of the above alternatives would allow for the creation of a record containing facts upon which a court could rule on the ordinance outside of the ambit of the actual criminal proceeding.

In the absence of any facts in the record upon which a finding of unconstitutionality can be predicated, the ordinance must be deemed valid. If, however, the burden is on the State, we are led to the next point.

III.

Counsel's stipulation relieved the appellee of any obligation of proving the validity of its ordinance.

The stipulation[13] of counsel in this case relieved the State of

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11. N.J.S. 2A:16-53 provides:

> "A person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

12. New Jersey Court Rules 4:52-1, *et seq.*

13. The full text of the stipulation is as follows:

Issues

"1. Is live entertainment permitted under the zoning ordinances of the Borough of Mount Ephraim in a C zone?

(Cont'd)

(Cont'd)

2. Is defendant's live nude dancing protected by the First Amendment?

3. Has the Borough of Mount Ephraim engaged in selective enforcement of its zoning ordinances?

4. May defendant place a new legend upon its obliterated non-conforming sign advertising live nude dancing?

5. Must defendant secure a permit to repaint the sign with a new legend?

6. May defendant replace the old legend from its obliterated non-conforming sign?

7. Must defendant secure a permit to return the old legend?"

Facts

"1. Defendant opened for business at its present location in a C zone in the Borough of Mount Ephraim in June 1973.

2. From its inception, defendant exposed for sale adult books, magazines and paraphernalia as well as having coin-operated movie peep shows.

3. In July 1976, defendant commenced offering live nude dancing.

* * *

5. Also in July 1976, defendant obliterated the legend from its existing, non-conforming sign without obtaining a permit.

6. The judge will view the defendant's activities in question on the stipulation that what he sees is substantially similar to what he would have seen on the dates alleged in the pending complaints."

any obligation it may have had of proving the validity of its legislative scheme. Counsel for the appellants and the State entered into a stipulation which it was agreed would give the courts all facts necessary to determine all issues presented, in order to resolve the litigation in toto. This stipulation was relied upon by the appellee, the trial courts, as well as the two appellate courts, to which this case has been previously presented.

The only issue which relates in any way to appellants' first question as presented to this Court is issue number 2 of the stipulation, "Is defendant's live nude dancing protected by the First Amendment?" The only relationship is that they both refer to the First Amendment, but beyond that they are substantially different from one another. The facts as stipulated were the only evidence of the issues that were stipulated.[14]

There was no burden on the prosecution of establishing facts to identify the State's interest or how it was served by the ordinance. The State was effectively deprived of that opportunity, if it was required, by the stipulation. There is nothing in the stipulation which would bring to mind the

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14. No agreement could be had with respect to factual statement number 4 concerning issue number 3 raising selective enforcement and testimony was produced by the appellants who voluntarily assumed the burden. Judge Schomer in the Municipal Court held that there was no selective enforcement. This holding was affirmed by Judge Deighan and adopted by him in the County Court, which was later affirmed by the Appellate Division of the Superior Court, for the reasons expressed by Judge Deighan. The Supreme Court of New Jersey declined to hear the matter and that issue has now been abandoned in this Court. Additionally, the municipal court judge under factual stipulation number 6 was to have viewed appellants' activity in order that findings with respect thereto could be included within the record. This was never accomplished as that court found that the issues could be resolved in the absence thereof.

appellants' first question presented to this Court so as to put the appellee on notice as to the nature of the State's burden assuming such a burden was on the State.

With respect to the second issue presented by the appellants, there is nothing to suggest that argument.[15] While the appellants set forth on page five as part of its procedural history the raising of the due process argument in its brief to the Municipal Court, this issue was not one of the seven issues stipulated by and between the parties. Because this issue was not raised below, no evidence upon this issue was produced.

The appellants have continued to raise these issues in many forms. Before this Court it appears as the second issue on page "i" of its brief. That issue is nowhere to be found in appellants' appeal papers and should not be entertained by this Court.

Should this Court, however, conclude that the burden was on the State and not obviated by the stipulation, then we turn to the next question.

IV.

The State has met any burden that may exist to show that the ordinance in question is not violative of the First Amendment.

The First Amendment serves to protect speech and other forms of expression. In *United States v. O'Brien,* 391 U.S. 367 (1968) at p. 376, the Court said "We cannot accept the view that an apparently limitless variety of conduct can be labeled speech

15. The filmed peep shows are films offered for sale by the appellants. Certainly, the patron can view the film prior to purchase the same way customers used to listen to recordings, and appellants' customers look through its books prior to purchase.

whenever the person engaging in the conduct can thereby express an idea." *O'Brien* was not dealing with commercial speech, which is subject to further restrictions than other forms of speech. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Turning to the case at bar, live nude dancing, which is at best a form of commercial speech, can be viewed in the light of the First Amendment. In *Duran v. Salem Inn*, 422 U.S. 922 (1975), the Court indicated that nude dancing might be entitled to First Amendment protection under limited circumstances. This Court has never held that as a matter of law live nude dancing falls squarely within the protections afforded by the First Amendment.

Former Chief Judge Cohen of the District Court of New Jersey, in his opinion of *Starshock, Inc. v. Shusted*, 370 F. Supp. 506 (D. N.J. 1974), *reversed on other grounds*, 493 F. 2d 1401 (3rd Cir. 1976), was faced with the issue of "is nude interpretive dancing embraced within the guarantee of freedom of speech under the First Amendment to the United States Constitution." page 507. The court held at page 508:

> "Plaintiffs fail in their argument to note the significant distinction between speech and conduct. The public exposure of sex organs and nudity in this setting is not a matter of free expression. Rather these acts are conduct cognizable as a crime under the common law (citations omitted) and generally considered as having a reasonable relationship to the public welfare, and therefore, within the police power of the legislature."

The court further noted at page 509 that:

> "The United States Supreme Court has consistently recognized the distinction between

> conduct, which may be regulated by the State, and expression, which may not be interefered with except upon proof of obscenity, *Miller v. California,* 413 U.S. 15 (1973)."

Starshock clearly stands for the proposition that nude dancing is not within the First Amendment. Put simply, appellant's nude dancing is not speech; and hence is not entitled to the protections afforded speech.

Assuming that live nude dancing is protected by the First Amendment, the Borough's ordinance satisfies the criteria of the *O'Brien* test. In *O'Brien,* this Court found that the burning of a draft card was speech; assuming that live nude dancing is also speech, there are four tests that must be satisfied for a municipality's ordinance to pass muster. These tests are that:

(1) The ordinance is within the power of the government;

(2) The ordinance furthers the governmental interest;

(3) The government's interest is unrelated to suppression of speech;

(4) The ordinance places no burden on the First Amendment beyond that which is necessary.

The appellants concede points 1 and 3 of the *O'Brien* test. The appellants dispute that the ordinance furthers any important or substantial governmental interests and that there is an impermissible burden on the First Amendment beyond that which is reasonably necessary.

The issue whether the ordinance in question furthers a governmental interest is actually the same issue as whether this

ordinance passes analysis under substantive due process. An inquiry as to whether a governmental interest is being furthered necessarily is one of fact and not of law.

The evils that the Borough seeks to avoid by prohibiting appellants' use may well be the same ones that were sought to be overcome in *California v. LaRue,* 409 U.S. 109 (1972). At page 111, the Court indicated that the customers of the liquor serving establishment in that matter were engaging in oral copulation, public masturbation, prostitution, rape and attempted rape in and about the premises. It can easily be seen that if there were no live female entertainers that there would be no possibility of these entertainers rendering the "services" that were sought to be avoided in *LaRue.*[16]

In *Young v. American Mini Theaters, Inc.,* 427 U.S. 50 (1976), it was held that "reasonable regulations of the time, place and manner of protected speech, where those regulations are necessary to further significant governmental interest are permitted by the First Amendment."

With respect to this ordinance posing an impermissible burden upon the First Amendment, it is submitted that there is no such burden since people are able to get the message elsewhere in other communities. Furthermore people can get the message right at the location of the appellants in the form of film and other devices available there. The only thing that cannot be gotten at the appellants' location is live entertainment, but certainly the message that the appellants hope to deliver to the public is amply distributed at appellants' present location.

Appellants' entertainment is available elsewhere thus protecting dissemination of information which may be protected

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16. *See also,* footnote 7, *supra.*

by the First Amendment. The First Amendment is designed to afford protection to speech so that ideas can be circulated in the marketplace. The appellee's ordinance does not prohibit all entertainment, but only live entertainment. The "message" that the appellants desire to spread can not only be found in other surrounding communities, but can be found in the appellants' premises in the form of films.[17] The appellants' arguments concerning the alleged lack of rational distinction between movies and live entertainment only highlights the availability of another form of entertainment through the cinema media.[18] If anything, this proves why the First Amendment is not being hindered, but that the First Amendment is being protected through an alternative means of disseminating the information.[19]

Accordingly, even on the present record, it must be found that the ordinance imposes no restriction on the rights of anyone to convey his message or on the rights of any one to receive it. Since the message can be conveyed or received at this location in another manner and at other locations in the same manner, this ordinance, as was the ordinance in *Young,* is merely a reasonable time, place and manner regulation.

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17. Appellee's contentions are further bolstered by looking at the matter that is presently being sold, that is, books, magazines, films and sexual paraphernalia. What is being regulated is not speech but the use of land in the municipality.

18. Here appellants contend that its permitted film entertainment is indistinguishable from its live entertainment. "The two forms of amusement are so similar in their operation and character as to be for the purposes of zoning, indistinguishable." (Appellants' Brief, page 31).

19. Additionally, the ordinance meets the three-prong test set forth in *Metromedia v. San Diego.* That test is as follows: (1) the restriction of speech does not seek to suppress the content of any message; (2) the ordinance serves significant government interest and is unrelated to the suppression of any speech; (3) the ordinance leaves open adequate alternative means of communication.

The ordinance does not work any prior restraint in contravention of the First Amendment. As now presented by the appellants, the issue is broader than simply whether appellants' activity, live nude dancing, is protected by the First Amendment in that the appellants have now raised prior restraints.[20] Even if this ordinance is held under the light of the law concerning prior restraint, it will pass muster.

In a sense, any law that deals with regulation is a law which contains prior restraints. The appellants would have this Court believe that the municipality's power to regulate is in this case tantamount to the municipality's creation of a prior restraint.

Unquestionably, a municipality in the exercise of its zoning powers can impose limits as to the place of a given use. For example, a municipality may regulate in what zones a movie theater is allowed. It may add as conditions such things as parking controls, rules of ingress and egress and hours of operation. All of these forms of regulation would be permissible under a zoning ordinance. If an applicant desired to have his business vary from the promulgated rules, he would have to seek a variance. So in a sense this variance requirement would be a prior restraint, however, it certainly is permissible and necessary in order to preserve the integrity of this zoning scheme. It is precisely this type of municipal activity that the appellants contend is a impermissible prior restraint. With this proposition, the appellee vigorously disagrees.[21]

It is further contended that the ordinance is void for vagueness. Appellee cannot agree with this proposition. There

20. Again, it must be noted that this issue as raised by the appellants was not raised in the trial court below.

21. Parenthetically, it should be noted in the context of prior restraint that the appellants offered live entertainment, and this action only arose after such entertainment was offered. Accordingly, there can be no question that the Borough of Mount Ephraim did not prevent the initial acts of the appellants.

can be nothing less vague than knowing when one is utilizing a specific piece of property for the commercial exploitation of live entertainment.

Additionally, appellants place into question the motivation of the Borough in its prosecution. Considering that appellee permitted appellants indistinguishable use from 1973 to the present and has attempted to exercise its authority only with respect to the live entertainment should be sufficient to demonstrate appellee's good faith.

Accordingly, any burden which was properly appellee's to shoulder and which has not been obviated by the stipulation, has been met.

V.

If the State has not met its burden what action should this Court take.

The appellee admits that the burden of proof is always upon the State to prove each and every element of a criminal offense. However, as previously discussed, this does not mean that the State must prove the constitutionality of its legislative scheme.

If in the present situation, the State was required to prove the validity of its legislative scheme by reason of the First Amendment, and that burden was neither obviated nor met by virtue of its omission rather than its failure of offered proofs, should this Court find the ordinance unconstitutional or remand the matter for further findings of fact.[22] Even if this Court feels constrained to reverse, it should do so by entering a finding of

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22. It is believed by appellee that the procedure would be permissible. *State v. Barnes*, 84 N.J. 362 (1980).

not guilty without impairing the ordinance under which the appellants were convicted. In no event would a finding of unconstitutionality be warranted in the absence of a complete factual record.

CONCLUSION

Each municipality is not required under the Federal Constitution to devote land for the commercial exploitation of activity protected by the First Amendment. The failure to include such activity in the recitation of permitted uses, without more, does not render the zoning ordinance or State enabling legislation constitutionally infirm in the absence of a factual constitutional showing.

Land use regulation is so related to the health, safety, morals and general welfare as to supply the rational nexus between the police power and the regulation. The failure to include within the ordinance uses customarily devoted to live entertainment is neither unreasonable, arbitrary or capricious. The burden of proof of the invalidity of the regulation is placed upon the appellants in a criminal prosecution. Whatever burden which the State may have had was obviated by the stipulation in this case and the State has proven that its regulation is a reasonable time, place and manner regulation as presented in *Young* and meets the *O'Brien* test. Accordingly, it is respectfully submitted that appellants' conviction be affirmed.

Respectfully submitted,

s/ ARNOLD N. FISHMAN
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